Supreme Court, U.S.
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No. _____

04167 3

In The Supreme Court of the United States

KEVIN LAMBERT CHAPLIN; JAMES P. JONES; ROBERT C. LEWIS, JR.; MARVIN C. OLIVER; LYNN EUGENE RITENOUR; DAVID EUGENE ROWLETTE; STEPHEN JACKSON TURLEY,

Petitioners,

v.

DU PONT ADVANCE FIBER SYSTEMS; DU PONT TEXTILE & INTERIORS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should an award of Rule 11 sanctions be affirmed on grounds not raised by the movant, not considered by the trial court and not briefed by the parties?

2. Should Petitioners' counsel be sanctioned failing to investigate the factual basis of the Petitioners' religious discrimination claim?

3. Should the Petitioners' be liable to the Respondents' for the attorney's fees incurred in defending the suit below because it was groundless or frivolous?

LIST OF ALL PARTIES TO THE PROCEEDING

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case, save and except that the Petitioners' counsel named below is also interested in the outcome of this decision:

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According to the Respondents' brief in the Fourth Circuit Court of Appeals, Du Pont Textile & Interiors, Inc. has a parent corporation, Coch Industries.

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Chaplin v. Du Pont Advance Fiber Systems*, 124 Fed. Appx. 771 (4th Cir. 2004) (per curiam) *cert. filed*, was decided on March 10, 2005. **App. A**. The district court's order and opinion dismissing the Petitioners' case on the merits was filed on November 25, 2003, *Chaplin v. Du Pont Advance Fiber Systems*, 293 F. Supp. 2d 622 (E.D. Va. 2003), its opinion and order awarding the sanctions at issue herein was filed on February 18, 2004. *Chaplin v. Du Pont Advance Fiber Systems*, 303 F. Supp. 2d 766 (E.D. Va. 2004). **App. B, App. C**.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was decided on March 10, 2005. **App. A**. No request for rehearing was made. There has been no order granting an extension of time to file a petition for writ of certiorari. There has been no cross-petition for writ of certiorari filed. Jurisdiction to review the decision in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1). This case does not require notification under Sup. Ct. R. 29.4(b) or (c).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Fed. R. Civ. P. 11(b)(2) provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after inquiry reasonable under the circumstances the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Fed. R. Civ. P. 11(b)(3) provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after inquiry reasonable under the circumstances the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have reasonable evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(c) provides:

> If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

42 U.S.C. § 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

Statement of the Facts

The Petitioners in this suit are all employees of Du Pont Advance Fiber Systems or Du Pont Textiles & Interiors, Inc. (collectively, "Du Pont"), who work at a facility located in Virginia. All of the Petitioners claim to be Confederate Southern Americans, which are the descendants of individuals who were citizens or subjects of the Confederate States of America. To these

descendants the Confederate Battle flag is a venerated symbol of their ancestry.

In September, 2000, Du Pont instituted a policy banning the display of Confederate symbols at work. The policy forbade the wearing or display of any material containing symbols associated with the Confederacy, including clothing, newspapers, pictures, bumper stickers and the like. As a result of this policy, the Petitioners were prevented from displaying Confederate symbols, including belt buckles and t-shirts and were made to remove bumper stickers from their cars.

As a result of this policy, which embodies the selective discrimination against the display of certain symbols, the Petitioners sued Du Pont on May 30, 2003 in the Eastern District of Virginia.

Proceedings Below

Du Pont responded by filing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This motion to dismiss was granted by the District Court on November 25, 2003, *Chaplin v. Du Pont Advance Fiber Systems*, 293 F. Supp. 2d 622 (E.D. Va. 2003).

Du Pont then requested that the Petitioners' counsel be sanctioned pursuant to both Fed. R. Civ. P. 11. The Petitioners responded thereto, and the district court took the matter under advisement.

On January 15, 2004, the district court invited Du Pont to file a motion requesting fees or costs

pursuant to 42 U.S.C. § 2000e-5(k), establishing deadlines for the filing, response and reply thereto and oral argument thereon. **(Order - Schedule of Briefing for Defendant's Motion for Fees: J. A. 600)**. Du Pont filed a motion requesting attorney's fees and expenses pursuant to 42 U.S.C. § 2000e-5(k), to which the Petitioners also responded.

At the hearing on the motions for sanctions and for fees, the district court initially declined to impose sanctions but did award Du Pont statutory attorney's fees it sought in principle, and invited further briefing on the amount of fees to be awarded. In connection with this briefing, Du Pont told the district court that a fee award could not be rendered against the Petitioners' counsel pursuant to 42 U.S.C. § 2000e-5(k), and asked it to reconsider its decision not to assess sanctions.

The district court did so, assessing $10,000 in sanctions against the Petitioners' counsel. Although it still declined to sanction Petitioners' counsel for bringing a national origin discrimination claim, it did sanction him pursuant to Rule 11(b)(3) for his alleged failure to investigate the factual basis of the Petitioners' claims of religious and racial discrimination. It also awarded Du Pont $26,100 in attorney's fees and $1,450 in costs pursuant to Section 2000e-5(k). **App. B**.

This disposition was appealed to the Fourth Circuit, United States Court of Appeals, which affirmed, albeit on somewhat different grounds. It affirmed both the sanctions for the religious discrimination claim made under Rule 11(b)(3) and the

statutory award of attorney's fees and costs pursuant to Section 2000e-5(k), but it found that sanctions under Rule 11(b)(3) were improper with respect to the racial discrimination claim, rejecting the logic of the district court's decision. However, it did find that sanctions would have been appropriate under Rule 11(b)(2), and affirmed the same sanctions on that ground. **App. A**.

Basis for Federal Jurisdiction in the Court of First Instance

The District Court had jurisdiction over this suit 28 U.S.C. § 1331 because the suit presents a federal question arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq*.

ARGUMENT

I. THE SANCTIONS AWARD LEVIED AGAINST THE PETITIONERS' COUNSEL SHOULD NOT HAVE BEEN AFFIRMED ON GROUNDS THAT WERE NEITHER RAISED NOR BRIEFED UNTIL APPEAL, AND WHICH WERE THEN RAISED ONLY BY THE APPELLATE COURT *SUA SPONTE*.

The disposition of this case essentially resulted in the Petitioners' counsel being sanctioned without also being given the opportunity to argue that the sanctions levied against him were unwarranted. Such a result is contrary both to the provisions of Rule 11 and to the law in other circuits, and is therefore improper.

1. Impositions of Rule 11 Sanctions Generally

Rule 11 states that an attorney who signs a court document represents thereby that he has conducted a reasonable inquiry into both the facts and the law, and that it is not being filed for the purpose of harassment or delay. Fed. R. Civ. P. 11(b). Its purpose is to deter baseless filings so that district courts may operate more efficiently. *Cooter & Gell v. Harmarx Corp.*, 496 U.S. 384, 391 (1990).

The question of whether a party has discharged its duty to reasonably inquire is an objective one, *In re Weiss*, 111 F.3d 1159, 1170 (4th Cir. 1997), determined with reference to what is reasonable under the circumstances. *Business Guides, Inc. v. Chromatic Comm. Enter., Inc.*, 498 U.S. 533, 551 (1991). Courts are charged with being especially carefully about imposing sanctions based on hindsight in Title VII cases. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421-22 (1978). On appeal, a sanctions award should be set aside if the court imposing it did so because of its erroneous view of the law or a clearly erroneous assessment of the evidence. *Cooter & Gell*, 496 U.S. at 405.

2. Sanctions Imposed in this Case

Here, the district court found that the Petitioners' counsel had not adequately investigated the facts underlying their racial discrimination claim, and therefore had violated Fed. R. Civ. P. 11(b)(3). *Chaplin*, 303 F. Supp. 2d at 771. However, on appeal

the court found that this was not the case, and that imposing sanctions under Rule 11(b)(3) was improper. *Chaplin*, 124 Fed. Appx. at 775. However, it went on to find that sanctions *were* appropriate under Rule 11(b)(2), based on the alleged failure of Petitioners' counsel to adequately investigate the law. *Id.* at 775.

3. Sanctions Should not be Imposed Without Affording the Party Being Sanctioned the Opportunity to Show Sanctions are Inappropriate

The problem with this disposition of the sanctions awarded to the Respondents is that it affirms a sanctions award on grounds never raised, considered or briefed. By rule, sanctions may only be imposed "after notice and a reasonable opportunity to respond." Fed. R. Civ. P. 11(c). However, by affirming a sanctions award pursuant to Rule 11(b)(2), Petitioners' counsel was never given the opportunity to address the basis for the sanctions award leveled against him. Although the appellate court held it could affirm the district court's judgment on "any ground supported by the record," *Chaplin*, 124 Fed. Appx. at 775, a general statement that a judgment may be affirmed on grounds supported by the record fails to give proper weight to the specific requirement in Rule 11 that a party to be sanctioned be given the opportunity to respond to the sanctions request. Put another way, a party cannot respond that sanctions are not appropriately granted on grounds not urged, and so affirming a sanctions award on alternative grounds never before urged effectively denies the party the opportunity to respond to the request that he be sanctioned.

This opportunity to respond is especially important where the district court and the circuit court of appeals agree that sanctions are appropriate, but for different reasons. Although an appellate court might determine that an attorney should not be sanctioned for failing to properly investigate Fact A he should nevertheless be sanctioned for failing to properly investigate Fact B because both sanctions are considered using the same standard, the same cannot be said of sanctions based on other sections of Rule 11, which require considering significantly different criteria in determining whether sanctions are called for. *Compare Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 444 (5th Cir. 1992) (imposition of Rule 11(b)(2) sanctions for failing to investigate the law requires considering the time available to conduct the investigation, the plausibility of the legal claims made in the pleadings, the complexity of the issues raised and whether the party is pro se) *with Navarro-Ayala v. Nunez*, 968 F.2d 1421, 1425 (9th Cir. 1992) (imposition of Rule 11(b)(3) sanctions for failing to investigate the facts requires considering the complexity of the subject matter, the party's familiarity with the subject matter, the time available for the inquiry and the ease of difficulty of accessing the requisite facts).

Finally, the decision to affirm the sanctions award on different grounds is at odds with the decisions of other courts. Decisions that recognize sanctions awards based on one kind of conduct should not be affirmed based on a claim that the record also shows the party is guilty of different conduct, even if that different conduct also might be sanctionable. *See, e.g., Hutchinson v. Pfeil*, 208 F.3d 1180, 1186 (10th Cir.

2000) (refusing to consider whether sanctions were appropriate under 28 U.S.C. § 1927 where sanctions were explicitly based on Rule 11); *Burda v. M. Ecker Co.*, 954 F.2d 434, 440-41 (7th Cir. 1992) (same); *see also Conkle v. Potter*, 352 F.3d 1333, 1337 (10th Cir. 2003) (dismissal of suit as sanction; refusing to uphold sanction "on an alternative legal rationale not relied on by the district court 'unless we can say as a matter of law that it would have been an abuse of discretion for the trial court to rule otherwise'").

The decision of the court below ignores the express provisions of Rule 11, it fails to afford the Petitioners' counsel the opportunity to show that sanctions are inappropriate under Fed. R. Civ. P. 11(b)(2) and it is at odds with the decisions of other courts. For all these reasons, the Court should grant the requested writ of certiorari, and make clear the imposition of sanctions award under these circumstances is inappropriate.

II. DETERMINATION THAT PETITIONERS' COUNSEL DID NOT INVESTIGATE THE FACTS SURROUNDING THE CLAIM OF RELIGIOUS DISCRIMINATION IS SIMPLY INCORRECT.

The second basis for imposing Rule 11 sanctions on Petitioners' counsel was the determination that he had failed to investigate the facts surrounding the Petitioners' claims of religious discrimination before filing suit, in violation of Fed. R. Civ. P. 11(b)(3). *Chaplin*, 303 F. Supp. 2d at 771. This sanction was upheld on this ground on appeal. *Chaplin*, 124 Fed.

Appx. at 774. In both cases, the courts determined that the evidence showed that the Petitioners informed the Respondents of their belief that the display of Confederate symbols was connected with their religious beliefs, in both cases the courts found the evidence did not show that the Petitioners had requested any accommodation that would allow them to display these symbols. *Id.*

1. Accommodation was Requested of Du Pont

The problem with the imposition of this sanction is two-fold. First, the decisions of the courts below threaten to reduce the request for accommodation prong of a religious discrimination claim to an exercise in "say the magic word," and if a plaintiff fails to utter the magic word "accommodation" then he has not properly invoked his rights. It is unclear how the Respondents could have possibly "informed Du Pont of their religious beliefs" regarding the display of the Confederate flag, *Chaplin*, 124 Fed. Appx. at 774, without Du Pont also understanding they sought to continue to display what had become an otherwise forbidden symbol – in what context would Du Pont have learned of the Petitioners' religious beliefs except for a request to be permitted to display the symbol, and if Du Pont understood the Petitioners wished to display the banned symbol for religious reason, how could this be anything other than a request for accommodation?

As the Fourth Circuit itself has recognized, an employer's knowledge of an employee's religious

beliefs may put the employer on notice of that the employee wishes to make some religious display at work, *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1020 n. 3 (4th Cir. 1996), *cert. denied*, 522 U.S. 813 (1997), and so Du Pont's notice of the Petitioners' religious beliefs supports the factual conclusion that the Petitioners requested what the law calls an "accommodation," and if the Petitioners requested an accommodation then their counsel cannot be sanctioned for failing to determine that they had done so.

2. Pre-Suit Requests for Accommodation are not Indicative of Knowledge that Such Requests were not Made

The more important problem is that the sanction is unsupported by logic. The courts below imposed and then affirmed sanctions based on the fact that a written request for accommodation was not made until soon before the suit was filed, which they both found supported the conclusion that Petitioners' counsel "had no factual foundation upon which to base the [religious discrimination] claim." *Chaplin*, 124 Fed. Appx. at 774; *see also Chaplin*, 303 F. Supp. 2d at 774.

Why is that? What about the fact that the Petitioners memorialized their request for accommodation of their religious beliefs in writing only after filing their EEOC charge indicates that their counsel knew that they had not done so previously? In fact, it shows *nothing* about what he knew or should have learned, especially in light of evidence showing that: (1) the Petitioners had told Du Pont mangers on

"numerous occasions" that they considered the Confederate flag (which contains within its design the Cross of Saint Andrew) a "venerated symbol of my Christian religious faith"; and (2) that all of the charges filed with the EEOC asserted that Du Pont was guilty of religious discrimination. In light of this, the assertion that Petitioners' counsel failed to investigate the factual circumstances of the Petitioners' claim before filing it is simply not correct, and should be corrected now.

III. PETITIONERS' TITLE VII SUIT WAS NOT FRIVOLOUS, UNREASONABLE OR WITHOUT FOUNDATION, AND SO AN AWARD OF ATTORNEY'S FEES AND COSTS TO THE RESPONDENT WAS IMPROPER.

By statute, a court in a Title VII case may (but is not required to) "allow the prevailing party ... a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k). However, where the prevailing party is the defendant, this Court has held that such an award should be made if and only if the plaintiff's case is "frivolous, unreasonable, or without foundation." *Christansburg Garment Co.*, 434 U.S. at 421. The court below found that such a fee award was appropriate because "[e]ach of the [Petitioners'] claims is missing the allegation that [Petitioners] suffered an adverse employment action, an essential element to an employment discrimination claims under *McDonnell Douglas*." *Chaplin*, 124 Fed. Appx. at 776.

The Petitioners begin by noting that the meaning of the court's holding is not clear. If the court means that the Petitioners simply did not allege that they suffered an adverse employment action, this is untrue. In their First Amended Complaint the Petitioners specifically claimed (on three different occasions) that they were the victims of an adverse employment action, because Du Pont's policy meant that if they exercised their right to display a symbol of their national group or race or which is associated with their religion that they would be fired. Therefore, if Du Pont should be awarded fees because of a failure to *allege* an adverse employment action renders the suit "frivolous, unreasonable, or without foundation," this conclusion is simply wrong.

Alternatively, even if the court means to say that there has been no adverse employment action because no adverse employment action such as termination has yet occurred, this does not show that the Petitioners' suit was "frivolous, unreasonable, or without foundation."

Title VII makes it unlawful to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment. 42 U.S.C. § 2000e-2(a)(1). Although a plaintiff must have suffered an adverse employment action in order to prevail in a Title VII suit, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24 (1993), ~~this d~~does not mean that a person may only sue under Title VII if they are fired. Although some courts take a narrow view of what constitutes an adverse employment action, *see, e.g., Boone v. Goldin*, 178 F.3d 253, 255 (4th

Cir. 1999), others take a more "expansive view" of what qualifies as an adverse employment action, *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000), and even the Fourth Circuit claims to recognize that adverse employment actions need not necessarily be an "ultimate employment decision." *Von Gunten v. Maryland*, 243 F.3d 858, 865-66 (4th Cir. 2001). Therefore, the question is whether the adverse employment action identified by the Petitioners is so "frivolous, unreasonable, or without foundation" as to justify a fee award.

The Petitioners argue that Du Pont's policy to discriminate against their venerated symbols, while not discriminating against other symbols has stigmatized them as bigots and racists, perpetuates an offensive and ignorant stereotype about them and that this has effectively ghettoized them within the workplace. Although the courts below apparently believe that the Petitioners have not suffered an adverse employment action until they have had their pay cut or were demoted or fired, *Chaplin*, 293 F. Supp. 2d at 627; *see also Chaplin*, 124 Fed. Appx. at 776, not all courts take such a restrictive view of what constitutes an adverse employment action. If the Fourth's Circuit's statement that an adverse employment action does not necessarily require that there have been an ultimate employment decision has any meaning, there must be occasions where something less than termination can support a Title VII suit. Although the Petitioners were unable to convince the courts below that this is one of those cases, that does not mean that their suit was frivolous, and holding otherwise would be to act as a Monday morning quarterback, engaging in exactly the

"post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation" that the Court prohibits. *Christansburg Garment Co.*, 434 U.S. at 421-22.

CONCLUSION

Allowing the precedent set in this case to stand will have an immediate and permanent chilling effect on the willingness of civil rights attorneys from Maryland to South Carolina to take on civil rights clients with anything but iron clad cases.

For all of the foregoing reasons, the Petitioners request this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1469

KEVIN LAMBERT CHAPLIN; JAMES PHILIP JONES; ROBERT COLEMAN LEWIS; MARVIN L. OLIVER; LYNN EUGENE RITENOUR; DAVID EUGENE ROWLETTE; STEPHEN JACKSON TURLEY,

Plaintiffs - Appellants,

versus

DU PONT ADVANCE FIBER SYSTEMS; DU PONT SPRUANCE; DU PONT TEXTILE & INTERIORS, INCORPORATED,

Defendants - Appellees,

and

SOUTHERN LEGAL RESOURCE CENTER, INCORPORATED; KIRK D. LYONS,

Parties in Interest.

No. 04-1471

KEVIN LAMBERT CHAPLIN; JAMES PHILIP JONES; ROBERT COLEMAN LEWIS; MARVIN L. OLIVER; LYNN EUGENE RITENOUR; DAVID EUGENE ROWLETTE; STEPHEN JACKSON TURLEY,

Plaintiffs,

versus

DU PONT ADVANCE FIBER SYSTEMS; DU PONT SPRUANCE; DU PONT TEXTILE & INTERIORS, INCORPORATED,

Defendants - Appellees,

and

SOUTHERN LEGAL RESOURCE CENTER, INCORPORATED,

Party in Interest,

versus

KIRK D. LYONS,

Party in Interest - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, District Judge. (CA-03-469)

Argued: December 3, 2004 Decided: March 10, 2005

Before WILLIAMS and MICHAEL, Circuit Judges, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Kirk David Lyons, SOUTHERN LEGAL RESOURCE CENTER, INCORPORATED, Black Mountain, North Carolina, for Appellants. Niall Anthony Paul, SPILMAN THOMAS & BATTLE, P.L.L.C., Charleston, West Virginia, for Appellees. **ON BRIEF:** James S. Crockett, Jr., SPILMAN THOMAS & BATTLE, P.L.L.C., Charleston, West Virginia; Jonathan P. Harmon, Robert F. Holland, MCGUIREWOODS, L.L.P., Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant Kirk D. Lyons (Lyons) appeals the award of sanctions against him in connection with his clients' Title VII claims for religious and racial discrimination. Lyons asserts that the district court abused its discretion in imposing sanctions against him pursuant to Fed. R. Civ. P. 11(b)(3) because he conducted an objectively reasonable investigation of the factual basis for the claims prior to filing the action.

Appellants Kevin Lambert Chaplin, James Philip Jones, Robert Coleman Lewis, Marvin L. Oliver, Lynn Eugene Ritenour, David Eugene Rowlette, and Stephen Jackson Turley (collectively, "Appellants") appeal the award of attorney's fees imposed upon them in connection with their Title VII claims for national origin, religious, and racial discrimination. Appellants contend that the district court abused its discretion in awarding attorney's fees under 42 U.S.C.A. § 2000e-5(k) (West 2003) because Appellants' claims were not frivolous, unreasonable, or without foundation.

For the reasons set forth below, we affirm.

I.

In September 2000, Du Pont Advance Fiber Systems, Du Pont Spruance, and Du Pont Textiles & Interiors, Incorporated (collectively, "Du Pont") instituted a policy banning the display of offensive symbols on Du Pont property. Included in the policy is a ban on the display of the Confederate battle flag on Du Pont's Spruance Plant in Richmond, Virginia.

Each of the seven Appellants is an employee at Du Pont's Spruance plant, and each professes to be a Caucasian, a Christian, and a Confederate Southern American. As a result of Du Pont's policy, Appellants brought a Title VII action, 42 U.S.C.A. § 2000e et seq., alleging employment discrimination based upon their race, religion,[1] and national origin.

The District Court for the Eastern District of Virginia dismissed Appellants' action as to all counts pursuant to Fed. R. Civ. P. 12(b)(6). Chaplin v. Du Pont Advance Fiber Systems, 293 F. Supp. 2d 622 (E.D.Va. 2003) (Chaplin I). Prior to the ruling of the court, Du Pont served upon Appellants its Rule 11 motion for sanctions, along with a letter requesting that they voluntarily dismiss the action within twenty-one days. Thereafter, when Appellants failed to dismiss their claims, Du Pont filed its sanctions motion with the district court. Du Pont also filed a motion for attorney's fees and expenses pursuant to 42 U.S.C.A. § 2000e-5(k).

In a hearing on Du Pont's motions, the district court denied Du Pont's Rule 11 motion for sanctions and granted its motion for attorney's fees and expenses against both Appellants and Lyons. However, because 42 U.S.C.A. § 2000e-5(k) does not provide for an award of fees against counsel, the district court vacated its decision to award attorney's fees against Lyons and its decision to deny Du Pont's motion for sanctions.

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[1] Appellant Stephen Jackson Turley did not join in this claim.

The district court issued a subsequent order granting Du Pont's motion for fees and expenses against Appellants as to all claims and granting in part its motion for sanctions against Lyons as to the religious and racial discrimination claims. Chaplin v. Du Pont Advance Fiber Systems, 303 F. Supp. 2d 766 (E.D.Va. 2004) (Chaplin II). Appellants noticed this appeal after the court denied their motion to alter or amend the judgment.

II.

We review for abuse of discretion both the district court's imposition of Rule 11 sanctions on a practicing lawyer, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990), as well as its award of attorney's fees under 42 U.S.C.A. § 2000(e)-5(k). Arnold v. Burger King Corp., 719 F.2d 63, 66 (4th Cir. 1983).

III.

A.

The district court levied sanctions against Lyons pursuant to subsection (b)(3) of Rule 11, which requires an attorney to assure that "the allegations and other factual contentions [within the complaint] have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]" Pursuant to this rule, before filing a claim, an attorney must conduct a reasonable investigation of the factual bases underlying the claim. Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 987 (4th Cir. 1987).

When there is no factual basis for a particular claim, the attorney has violated Rule 11(b)(3). In re Kunstler, 914 F.2d 505, 516 (4th Cir. 1990).

1.

The district court did not abuse its discretion when it found that the religious discrimination claim lacked any factual basis. In a Title VII action for employment discrimination based upon the plaintiff's religion, the plaintiff must show either that he suffered disparate treatment as a result of his religion or that the employer failed to accommodate his religious practices. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1017 (4th Cir. 1996) (citations omitted). Lyons argues only that the district court erred in awarding sanctions on Appellants' failure to accommodate claim.

To establish a prima facie religious accommodation claim, a plaintiff must establish that (1) he has a bona fide religious belief that conflicts with an employment requirement; (2) he informed the employer of this belief and requested an accommodation thereof; and (3) he was disciplined for failure to comply with the conflicting employment requirement. Id. at 1019.

Appellants failed to meet the second prong of the test.[2] Although Appellants apparently informed Du Pont of their religious beliefs, no evidence exists in the record to suggest that Appellants requested an

[2] The district court declined to address the first and third prongs of the failure to accommodate analysis in its ruling on Du Pont's sanctions motion.

accommodation of these beliefs prior to the filing of their Equal Employment Opportunity Commission (EEOC) charge. In fact, it was not until months after their EEOC charges had been filed and subsequently denied that Appellants submitted letters to their supervisors requesting that they be allowed to display confederate flag symbols. As noted by the district court, Lyons' eleventh-hour attempt to bolster his clients' religious discrimination claim was disingenuous at best, and supports the court's finding that Lyons had no factual foundation upon which to base the claim. Chaplin II, 303 F. Supp. 2d at 774. Accordingly, the district court did not abuse its discretion when it awarded sanctions against Lyons for failure to comply with Rule 11(b)(3).

2.

The district court also awarded sanctions against Lyons in connection with Appellants' racial discrimination claim. The court based the award upon its finding that the claim was "neither factually supported nor supportable" as pled because Appellants failed to suggest that "Du Pont's policy discriminates, directly or indirectly, against Caucasians." Chaplin II, 303 F. Supp. 2d at 771. Although we believe the district court was incorrect in its analysis of Appellants' race discrimination claim, we do not believe that the court abused its discretion in awarding sanctions and, thus, affirm on other grounds.

According to the district court, the fact that Appellants' national origin class is multiracial "practically eviscerates" their racial discrimination

claim. Id. However, this logic is problematic. Generally speaking, every national origin class is multiracial. Thus, it is quite possible that an employee could have cognizable causes of action for both national origin discrimination and race discrimination. An employer could discriminate against all Caucasian employees, as well as all employees of Confederate Southern American descent, or that employer could discriminate against only Caucasian employees who were also of Confederate Southern American descent. An attorney representing a member of both classes should not be threatened with the risk of sanctions for bringing causes of action for both race discrimination and national origin discrimination. As such, the district court erred in awarding sanctions against Lyons on this basis.

Lyons' actions are sanctionable, however, under Fed. R. Civ. P. 11(b)(2), which allows the district court to award sanctions for unwarranted legal contentions. Rule 11(b)(2) requires an attorney to certify that "the claims . . . are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . ."

It is well-established that to set forth a prima facie case of employment discrimination, the plaintiff must assert that he suffered some sort of adverse employment action. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Appellants failed to aver that they had suffered any adverse employment action. Clearly, then, their race discrimination claim, as pled, was unwarranted by existing law. Moreover, to

the extent that Lyons was attempting to expand the law of adverse employment action, the record fails to provide any guidance as to what action taken by Du Pont Appellants claim was adverse. We may affirm a judgment on any ground supported by the record. See MM v. School District, 303 F.3d 523, 536 (4th Cir. 2002). Thus, we find that the district court's award of sanctions against Lyons in connection with Appellants' race discrimination claim was proper pursuant to Fed. R. Civ. P. 11(b)(2).

B.

In addition to warranting sanctions against Lyons, the absence of an adverse employment action in this case supports an award of attorney's fees against Appellants. Title VII allows a district court, in its discretion, to award a prevailing defendant reasonable attorney's fees if the plaintiff's case was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). To make this determination, the district court should "examine the suit against the background of the law at the time of the filing and the facts known to [the plaintiff]." Lotz Realty Co., Inc. v. United States Dept. Of Housing and Urban Dev., 717 F.2d 929, 932 (4th Cir. 1983).

Each of Appellants' claims is missing the allegation that Appellants suffered an adverse employment action, an essential element to an employment discrimination claim under McDonnell Douglas. It was unreasonable for Appellants to bring

the action based upon a policy that caused them nothing more than aggravation. Accordingly, the award of attorney's fees by the district court was proper on all counts.[3]

IV.

Pursuant to the foregoing discussion and analysis, we affirm the district court's award of sanctions and attorney's fees.

AFFIRMED

[3] Additionally, for the reasons discussed in section III.A.1, the award of attorney's fees was appropriate on the religious discrimination claim because Appellants knew that they failed to request an accommodation prior to the filing of or within their EEOC charges, thereby making the claim frivolous, unreasonable, and without foundation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KEVIN LAMBERT CHAPLIN, *et. al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No.
	)	3:03cv469
DU PONT ADVANCE FIBER SYSTEMS, DU PONT SPRUANCE, DU PONT TEXTILE & INTERIORS, INC.,	)	
	)	
Defendants.	)	

[ENTERED: FEBRUARY 18, 2004]

MEMORANDUM OPINION
(Granting in Part and Denying in Part Defendants' Rule 11 Motion for Sanctions and Granting Defendants' Motion for Attorneys' Fees and Expenses)

This case is before the Court on Defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure [hereinafter "Rule"] 11 and Defendants' Motion for Attorneys' Fees and Expenses. The parties thoroughly briefed both motions, and on January 30, 2004, the Court heard oral argument. After reviewing the pleadings, memoranda, and affidavits filed in support thereof and considering the arguments and case law offered by counsel, the Court denied Defendants' Rule 11 Motion for Sanctions and granted

Defendants' Motion for Attorneys' Fees and Expenses. The Court reserved its ruling on the amount and apportionment of fees to be awarded but announced that it would award fees, under 42 U.S.C. § 2000-e(5)(k) against both Plaintiffs and their counsel.

Thereafter, and with leave of Court, the Defendants filed a supplemental memorandum on attorneys' fees seeking reconsideration of both the Court's ruling on the Rule 11 motion and its ruling with regard to Title VII fees and costs. On February 13, 2004, Plaintiffs responded. Within their memoranda, both parties alerted the Court to its error in forecasting an award of fees against Plaintiffs' counsel under 42 U.S.C. § 2000-e(5)(k). *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761-62 (1980); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1508-09 (10th Cir. 1996); *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 504 (3rd Cir.)(citations omitted), *cert. denied*, 502 U.S. 940 (1991); *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 915 (11th Cir. 1982). The Court concedes the error and vacates its ruling on that point. The Court cannot and will not levy Defendants' fees and costs against Plaintiffs' counsel under 42 U.S.C. § 2000-e(5)(k).

On the other hand, having reflected on the matter for several additional weeks, the Court also vacates its January 30, 2004 bench ruling with respect to Defendants' Motion for Rule 11 Sanctions. Upon reconsideration, and for the reasons detailed below, the Court now grants Defendants' Rule 11 motion in part, and denies it in part. The Court maintains the balance of its position with respect to Defendants' motion for

fees and expenses, granting said motion and apportioning the fees appropriately.

I. Defendants' Motion for Rule 11 Sanctions

Within their Rule 11 motion, Defendants argued that Plaintiffs' counsel, Kirk Lyons, Esquire ("Lyons"), should be sanctioned (1) for filing an Amended Complaint that contains claims not warranted by existing law, by a non-frivolous extension, modification, or reversal thereof, or by the establishment of new law; and (2) for filing claims that contain allegations and other factual contentions without current or potential future evidentiary support. At an earlier stage, this Court reviewed Defendants' motion and deferred its ruling pending supplemental briefing on critical sub-issues. Additionally, at that time, the Court raised a third Rule 11 issue, which was whether Lyons's actions, in filing pleadings without having the sponsorship of an attorney admitted to practice in the Eastern District of Virginia, comported with Local Rule 83.1. Subsequently, the parties analyzed all three issues in light of the Rule 11 jurisprudence of the Fourth Circuit.

First, as it relates to pleadings in general, Federal Rule of Civil Procedure 11(b) states that:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney...is certifying that to the best of the person's knowledge, information, and belief,

> formed after an inquiry reasonable under the circumstances, -
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and]
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery....

Fed. R. Civ. P. 11(b). In other words, whether a civil complaint satisfies the requirements of Rule 11 depends upon how it measures up against three criteria. First, the complaint must be filed for a proper purpose. Second, each count of the complaint must have a sufficient basis in law. And third, each of the claims must have a sufficient basis in fact.

With respect to the first factor, Defendants argue that Plaintiffs' "crusading," repeat litigation of identical claims and subject matter, in the face of a number of adverse rulings from various courts and

circuits, supports an inference that the immediate litigation was meant to harass DuPont. Under the circumstances of this case, which emphasizes Plaintiffs' claim of national origin discrimination, the Court does not agree.

Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *See* Fed. R. Civ. P. 11 (notes of advisory committee on 1983 amendment). Likewise, Rule 11 "does not seek to stifle the exuberant spirit of skilled advocacy or to require that a claim be proven before a complaint can be filed." *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 988 (4th Cir. 1987). "Creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment." *Davis v. Carl*, 906 F.2d 533, 538 (11th Cir. 1990).

Here, it is the opinion of the Court that, regardless of the merits of the claims, Lyons's purpose in filing the immediate lawsuit was not to harass DuPont but, rather, to create or expand Title VII jurisprudence. As the Fourth Circuit has said, "if a complaint is filed to vindicate rights in court, and for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus, the purpose to vindicate rights in court must be central and sincere." *In re Kunstler*, 914 F.2d 505, 518 (4th Cir. 1990), *cert. denied*, 499 U.S. 669 (1991). Whatever Lyons's collateral

intentions were, this Court is convinced that he filed the immediate action, on behalf of the plaintiffs, primarily to broaden the Fourth Circuit's interpretation of "national origin" protection. Consequently, the Court finds no proof that Lyons filed this action for an improper purpose.

Second, Defendants request sanctions because Lyons filed the immediate case in spite of the contrary Fourth Circuit ruling in *Terrill v. Chao*, No. 01-1877, 31 Fed. Appx. 99, 2002 WL 376681 (4th Cir. Mar. 11, 2002)(per curiam), *cert. denied*, 537 U.S. 823 (2002). In so arguing, Defendants remind this Court that, in *Terrill*, the Fourth Circuit ruled against Lyons when he argued that Title VII included "Confederate Southern American" as a protected class. In light of *Terrill*, it is Defendants' position that the immediate case 'ha[d] absolutely no chance of success under the existing precedent.'" *Lewin v. Cooke*, 95 F. Supp. 2d 513, 527 (E.D. Va. 2000)(quoting *Brubaker v. City of Richmond*, 943 F.2d 1363, 1373 (4th Cir. 1991)).

For his part, Lyons concedes that an argument that "has absolutely no chance of success under the existing precedent" may be sanctionable. *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002)(citation omitted). He insists, however, that the precedent precluding the claim must be authoritative. *See Goldstein v. Malcolm G. Fries & Assocs.*, 72 F. Supp. 2d 620, 628 (E.D. Va. 1999). The Fourth Circuit agrees. In *Hogan v. Carter*, 85 F.3d 1113 (4th Cir. 1996), the Fourth Circuit noted that:

> [S]ince unpublished opinions are not even regarded as binding precedent in our circuit, such opinions cannot be considered in deciding whether particular conduct violated clearly established law . . . . . We could not allow liability to be imposed . . . based upon unpublished opinions that we ourselves have determined will be binding only upon the parties immediately before the court.

Id. at 1118 (refusing to reject qualified immunity based upon an unpublished opinion that was not directly on point). In this case, although the Court has found no authoritative case law anywhere in the nation to support Plaintiffs' claim of national origin discrimination, neither has it found a single, binding case to the contrary. Thus, this Court cannot say that the plaintiffs' claim is "[un]warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2). Thus, Defendants' motion for sanctions will not be granted on that basis.

On the other hand, when compared with the requirements of Rule 11(b)(3), Lyons's Amended Complaint gives this Court great pause. According to Rule 11(b)(3), before filing Plaintiffs' claims, Lyons was required to assure that "the allegations and other factual contentions [therein had] evidentiary support or, if specifically so identified, [were] likely to have evidentiary support...." Fed. R. Civ. P. 11(b)(3). This

means that Lyons was required to conduct a reasonable investigation of the factual bases underlying each of his clients' claims before filing them. *See Cleveland Demolition Co.*, 827 F.2d at 987. When there is no factual basis for a particular claim, that claim violates Rule 11(b)(3). *See In re Kuntsler*, 914 F.2d at 516.

In this case, Plaintiffs' amended complaint included three allegations. In sum, it averred that DuPont's ban on the display of the Confederate flag discriminated against them based upon their national origin, their religion, and their race. With respect to Count I, Plaintiffs provided the Court with voluminous facts, both supported and unsupported, purporting to back their claim of national origin discrimination. Irrespective of the merits of that claim, it marginally satisfies Rule 11(b)(3).

The Court originally deemed Count II a "close call," denying Defendants' related motion for sanctions. After further consideration, however, the Court is convinced that Lyons had absolutely no factual foundation upon which to base a claim of religious discrimination. As this Court previously noted, nowhere in the Amended Complaint did Plaintiffs allege that they had both requested and been denied a religious accommodation. Even Plaintiffs' belated letter-writing effort failed to support such a claim. Accordingly, it is the opinion of this Court that Count II is so lacking in reasonable evidentiary support that the Court must impose Rule 11 sanctions for the filing of that claim.

Likewise, the Court finds that Plaintiffs' Count III racial discrimination claim is neither factually supported nor supportable. The plaintiffs are all Caucasian, but never once did they suggest that DuPont's policy discriminates, directly or indirectly, against Caucasians. On the contrary, Plaintiffs' averred class, Southern Confederate Americans, is multiracial. This fact alone practically eviscerates Plaintiffs' claim that DuPont discriminated against them on the basis of race. Thus, Plaintiffs' amended complaint contains no factual basis whatsoever to support an allegation that DuPont's ban discriminates by race. Lyons's prefiling inquiry could not have revealed otherwise.

Consequently, as the Court noted on January 30, 2004, it is clear that Count III is both frivolous and unwarranted such that it fails to satisfy the requirements of Rule 11(b)(3). Although the Court previously declined to award sanctions with respect to Count III, upon further consideration the Court vacates its previous ruling and grants the Defendants' motion for sanctions on that count.

The purposes of Rule 11 are to compensate the victims of the violation, to punish present litigation abuse, to streamline court dockets, to facilitate court management, and to deter future litigation abuse. *In re Kuntsler*, 914 F.2d at 522-23. Whether Counts II and III are the product of bad faith or just poor judgment, it is the opinion of the Court that each is so devoid of merit as to warrant Rule 11 sanctions. Consequently, although the Court denies Defendants' Rule 11 motion for sanctions with respect to Count I of the Amended Complaint, the motion is granted with respect to

Counts II and III. Fed. R. Civ. P. 11(b)(3). The Court will determine the appropriate amount of sanctions to award after considering other relevant factors below.

II. Sanctions Based upon Alleged Violation of Local Rule 83.1

Here, although the Court need not rehash the entire procedural history of the case, it is important to repeat some of its most important chronology. Initially, Mr. Lyons was admitted to this Court *pro hac vice* on the motion of local counsel, Mr. Thomas Roberts. Thereafter, on October 7, 2003, the Court allowed Plaintiffs' local counsel to withdraw, leaving the plaintiffs with the representation of Mr. Lyons, who operates out of the Southern Legal Resource Center in Black Mountain, North Carolina, but without the sponsorship of an attorney admitted to practice in the Eastern District of Virginia. At that time, Mr. Lyons made repeated efforts to secure new local counsel.

In the meantime, however, on October 14, 2003, Defendants filed a Rule 12(b)(6) Motion to Dismiss. On October 25, 2003, Mr. Lyons, still without local counsel, sent a letter to the Court requesting that Local Rule 83.1 be waived in order to accommodate his situation.[1]

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[1]Local Rule 83.1 states, in pertinent part:

> Any counsel presenting papers, suits or pleadings for filing, or making an appearance, must be members of the bar of this Court, or must have counsel who are members of the bar of this Court to join in the pleading by endorsement.... This obligation may not be avoided or delegated without leave of Court.

Loc. R. 83.1 (F) (E.D. Va. 2000).

Without waiting for the Court to answer, however, on October 27, 2003, Lyons submitted a response to the motion to dismiss, which the Clerk of the Court received but did not file because of Lyons's *pro hac vice* status. Lyons submitted the response on the date it would otherwise have been due. Thereafter, on October 31, 2003, Lyons helped his clients file individual motions, purportedly *pro se*, in which Plaintiffs urged the Court to adopt Lyons's response as their own.

Although, on October 17, 2003, Defendants had formally warned Plaintiffs' counsel that they would eventually file a motion for sanctions unless Plaintiffs chose to dismiss the case, they waited the required 21-day "safe harbor" period, as required by Federal Rule of Civil Procedure 11(c)(1)(A), to do so. Then, on November 7, 2003, Defendants filed the Motion for Rule 11 Sanctions that is currently before the Court. Ultimately, on November 19, 2003, after repeated efforts to assist Lyons in securing local counsel, and finding it in the interest of justice to do so, this Court waived Local Rule 83.1 and allowed Lyons to serve as counsel, for the purposes of this case only, without the sponsorship of local counsel.

Sua sponte, in its November 25 Memorandum Opinion, the Court advised the parties that it would consider sanctioning Mr. Lyons for his apparent attempt to circumvent Local Rule 83.1. Of course, Lyons argues that he did not attempt to skirt the Local Rule. He posits that he did what he had to do, under the circumstances, in order to most zealously represent his clients.

The Court understands that Lyons was in a difficult situation. He had no local counsel sponsorship, and as this Court is aware from its own attempts to intervene, a number of qualified local attorneys declined the invitation to assist Lyons. What the Court finds particularly vexatious, however, is that Lyons, who is himself not admitted to practice in the Eastern District, chose to file pleadings on behalf of his clients and to label them *pro se*. At the time, Lyons had written a letter to the Court asking for relief from the requirements of Rule 83.1(F). Thus, it is clear that Lyons was aware of the strictures of that Rule. Lyons also knew that the Court was attempting to identify a member of the local bar who might be willing to sponsor him in this case.

Lyons admits that, at the time he assisted his clients with the "*pro se*" pleadings, he was aware of the opinion in *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075 (E.D. Va. 1997), *aff'd*, 172 F.3d 44 (4th Cir. 1999). *Laremont-Lopez* makes clear that this Court "considers it improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as *pro se*." *Id.* at 1077. Furthermore, the practice of ghost writing documents "will not be tolerated in this Court." *Id.* at 1080.

Lyons tries to distinguish his actions from those of a ghost writer by arguing that, in this case, the Court was fully aware that he wrote the responsive pleading; thus, the Court can assign blame and/or responsibility accordingly. That is true. What Lyons's argument overlooks, however, is the rationale behind the Local

Rule. The Rule exists to provide supervision over those attorneys who practice before the Court.

Lyons contends that he had no other alternative, except to suffer a default. Clearly, that is not true. Lyons had several options. First, he could have waited for the Court to respond to his request for assistance. Second, he could have taken advantage of the "safe harbor" period and dismissed the case until he was prepared to file and prosecute it properly. Lyons argues that, had he taken the voluntary dismissal, he still might have been subjected to Defendants' threat of sanctions. That may be the case, but just as they had forewarned, Defendants did not file their motion for sanctions until after Plaintiffs refused to dismiss the matter.

In the end, the question is whether Lyons's conduct, as it relates to the local rule, was so egregious that it merits sanctions. As the Court stated during oral argument, it has found no evidence of intentional or malicious wrongdoing on Lyons's part. Thus, although Lyons's actions were improper, it is the Court's opinion that its public reprimand of Lyons was sufficient so as to serve as a future deterrent. Additional sanctions for such actions are unnecessary.

III. Defendants' Motion for Attorneys' Fees and Expenses

As a second and separate motion, Defendants ask the Court for $59,989.49 in attorneys' fees and $2,240.25 in costs under 42 U.S.C. § 2000e-5(k). Title VII, 42 U.S.C. § 2000e-5(k) provides that, "In any action

or proceeding under this subchapter, the Court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs...." 42 U.S.C. § 2000e-5(k). According to the United States Supreme Court, this means that attorneys' fees should be awarded to the prevailing defendants in a Title VII case upon a finding that the plaintiffs' action was "frivolous, unreasonable, or without foundation, *even though not brought in subjective bad faith.*" *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)(emphasis added).

A. An Award of Fees and Costs is Appropriate

For a number of reasons, it is the Court's opinion that although neither Plaintiffs nor Lyons brought Plaintiffs' national origin count in subjective bad faith, the claim itself was frivolous, unreasonable, and without foundation. In so deciding, the Court first considered the state of the law in both the Fourth Circuit and the nation with respect to what anchors an actionable Title VII claim. To that end, the United States Supreme Court has made abundantly clear, and Plaintiffs concede, that in order to state a cognizable claim, every Title VII claimant must suffer an adverse employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993). Plaintiffs, here, did not suffer an adverse employment action, and it was unreasonable for them to argue that they had experienced such adversity.

Second, as the Court discussed in awarding Rule 11 sanctions, Plaintiffs' religious discrimination count failed to aver that Plaintiffs ever requested an

accommodation. Plaintiffs' eleventh hour attempt to show that they made such a request, many weeks after they sought relief from the Equal Employment Opportunity Commission, is not only incredible but, frankly, disingenuous. Accordingly, it is the Court's opinion that Count II is also frivolous, unreasonable, and without foundation.

Finally, and worst of all, is Plaintiffs' racial discrimination claim. According to the Fourth Circuit, an award of attorneys' fees is appropriate where "the record...is devoid of any credible evidence to support a claim that [plaintiffs were discriminated against] for racial reasons." *Arnold v. Burger King Corp.*, 719 F.2d 63, 67 (4th Cir. 1983). Count III fails to aver, in any way, shape, or form, that Plaintiffs received disparate treatment based upon their race. In fact, inasmuch as Plaintiffs' group of Confederate Southern Americans seems to include Caucasians, African-Americans, and a Native American, Plaintiffs aver no *one, particular* race that was affected by DuPont's ban. Thus, in addition to meriting Rule 11 sanctions, the Court finds Count III to be particularly frivolous and worthy of reimbursement under 42 U.S.C. § 2000-e(5)(k).

To reiterate, the Court is not convinced that this lawsuit was inspired by improper motives. By filing this case, it appears that Plaintiffs sought to extend the scope of protection afforded, under Title VII, to a proposed national origin group composed of Confederate Southern Americans. Based on current Civil Rights jurisprudence, however, the likelihood of attaining such a goal is improbable. Thus, while the Court is mindful that Plaintiffs' ambitions appear to be

sincere, it cannot permit them to pursue their foundationally deficient claims at Defendants' expense. Accordingly, Defendants' motion for fees and costs is granted.

With respect to the fee calculation and apportionment, the Court's analysis is complicated by Plaintiffs' lack of bad faith, coupled with their meager financial means. Accordingly, the truly burdensome questions for this Court are how much of Defendants' requested fees and costs should be awarded and how the costs should be apportioned among the individual plaintiffs.

B. How to Calculate Fees – the *Johnson* Factors

The Fourth Circuit has identified twelve factors, first enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), that have some bearing on the appropriate amount of attorneys' fee to award to prevailing plaintiffs. *See Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1976); *Anderson v. Morris*, 658 F.2d 246, 248-49 (4th Cir. 1981). To determine the appropriate amount of an award, the Court begins by multiplying the number of hours reasonably expended on the case by the attorneys' reasonable or customary hourly rate. *Allen v. Burke*, 690 F.2d 376, 380 (4th Cir. 1982); *Anderson*, 658 F.2d at 249. Once that figure is established, the court should consider the remaining *Johnson* factors and then adjust the amount accordingly.

Courts have traditionally considered at least twelve factors before awarding fees, including:

> (1) the time and labor expended;
> (2) the novelty and difficulty of the questions raised;
> (3) the skill required to properly perform the legal services rendered;
> (4) the attorney's opportunity costs in pressing the instant litigation;
> (5) the customary fee for like work;
> (6) the attorney's expectations at the outset of litigation;
> (7) the time limitations imposed by the client or circumstances;
> (8) the amount in controversy and the results obtained;
> (9) the experience, reputation and ability of the attorney;
> (10) the undesirability of the case within the legal community in which the suit arose;
> (11) the nature and length of the professional relationship between attorney and client; and
> (12) attorneys' fees awards in similar cases.

Allen, 690 F.2d at 379 (quoting *Barber*, 577 F.2d at 226). The district court is not required to engage in a lengthy discussion concerning what portion of the award is attributable to each factor. In fact, as the United States Supreme Court noted in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), many of the *Johnson* factors "are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate" and need not be

further considered at all. *Id.* at 434 n.9; *see also Anderson*, 658 F.2d at 249.

In addition to the *Johnson* factors, the district court may consider the relative financial positions of the litigants. *Arnold*, 719 F.2d at 67. As the Fourth Circuit noted more than twenty years ago:

> Indeed, fee awards that callously disregard the financial straits of a losing plaintiff would soon defeat the overarching remedial purposes of Title VII by discouraging all but the airtight cases. *Christiansburg*, 434 U.S. at 422. The dual interests of equity and deterrence can be advanced without giving overriding consideration to the punitive value of a fee award, particularly when the reduced award still represents a substantial burden on the plaintiff and the defendant is fully capable of absorbing a reasonable share of its legal fees without hardship.

Arnold, 719 F.2d at 68. Of course, the financial position of the plaintiff is only one factor for the court to consider. Additionally, after determining the reasonable value of the work performed in a case, the trial court may reduce the fee award in light of mitigating factors, such as the difficulty of the case, the motivation of the plaintiffs, and the relative economic status of the parties. *Id.*

Although, here, the Defendants clearly satisfied the statutory criteria under Title VII for recovery of reasonable attorneys' fees and costs, the task of calculating and apportioning a specific award will require a two-part analysis. First, the Court will determine what constitutes a reasonable fee for the services performed in this case. Next, the Court must balance that number against Plaintiffs' ability to pay. The final result will demonstrate a reasoned balance of a number of factors, not the least of which are the plaintiffs' motivation for filing the case and the potential deterrent effect of the award.

Of course, not all of the *Johnson* factors apply to the immediate case. Many are absorbed into the initial lodestar calculation. *See Anderson*, 658 F.2d at 249. Indeed, as counsel for both sides agree, only a few of the *Johnson* factors are particularly important here. In order to determine how much weight to give to those factors, the Court has reviewed and considered all of the affidavits and supporting information submitted by the parties relating to fees and costs. From that information, the Court has distilled the most important facts and has weighed each accordingly.

1. Time and Labor Expended

First, as the Supreme Court noted in the *Hensley* case, the starting point in establishing the proper amount of an award is the number of hours reasonably expended, multiplied by a reasonable hourly rate. 461 U.S. at 433. Here, Plaintiffs' counsel concedes that the hourly rate claimed by DuPont's attorneys is reasonable. The dispute revolves around the quantity

of time defense counsel expended on the matter, a matter which Defendants have repeatedly alleged is patently frivolous.

To that end, the Court has made a number of observations. First, the initial Complaint in this case was never served on Defendants, and the Amended Complaint, which was twenty-five (25) pages in length not including several dozen pages of attachments, included only three, basic claims of Title VII employment discrimination. Second, the Amended Complaint was neither legally nor factually complex. Third, approximately four months from the date of filing, the Amended Complaint was dismissed on a Rule 12(b)(6) motion without the necessity for oral argument. And finally, no discovery was ever taken in this case.

During oral argument on their motion for fees, counsel for the defendants acknowledged that a reasonably competent attorney, reviewing the Amended Complaint, could have discerned its frivolity from a simple reading. To fashion an appropriate response, however, required Defendants to employ the efforts of five attorneys and a paralegal. The combined legal efforts of the defense team resulted in 393 billable hours, $59,989.49 in discounted fees, and $2,240.25 in associated costs. According to their pleadings, this amount included a deduction of approximately $19,000 in additional legal fees, which represents a reduction of an additional 133 hours of attorney time.

Broken down by team member, the Defendants' claim of $59,989.49 for 393 hours of labor consists of the following:

Attorneys	Hours	Rate	Total
James S. Crockett, Jr.	89.5	$205	$18,347.50
Niall A. Paul	96.8	$172	$16,649.60
Robert F. Holland	38.8	$163	$6,355.44
Lisa Bray	103.9	$130	$13,507.00
Mark Glover	41.1	$121	$4,973.10
Paralegal			
Sandra Burch	22.9	$75	$1,717.50

In support of their fee application, the Defendants filed the affidavit of Robert E. Eicher, Esquire, a senior partner with the law firm of Williams Mullen. Mr. Eicher is a well-known and distinguished member of the Richmond Bar. In Mr. Eicher's professional opinion, the hours expended by DuPont's counsel are both reasonable and consistent when compared to the prevailing standards in the Richmond area. On the contrary, Plaintiffs vigorously challenge both the number of attorneys DuPont employed and the number of hours each attorney expended while litigating this matter. Plaintiffs' argument focuses specifically on the hours the attorneys devoted to reviewing each other's work, analyzing material, gathering background information about the plaintiffs, consulting with one another, and refining their work product. Additionally, Plaintiffs note that approximately forty-two percent (42%) of Defendants' total, claimed hours were devoted to prosecuting their motions for sanctions and attorneys' fees.

This Court has carefully reviewed the billable hours submitted by the defense team and the specific tasks performed by each attorney in compiling those hours. In so doing, the Court is of the opinion that some pruning is in order. Before determining the number of billable hours to be awarded to each attorney, however, the Court must review the balance of the *Johnson* factors.

2. Novelty and Difficulty of Questions Raised

The issues involved in this three-count Title VII action were not complex but did require considerable research and analysis. Moreover, as the parties are now acutely aware, the Fourth Circuit has never specifically rejected Plaintiffs' claims in a published opinion. As Mr. Crockett pointed out during oral argument, this absence of authority required the defense team to scour the legal landscape to determine what, if any, arguable legal basis existed to support Plaintiffs' approach to Title VII.

By the same token, however, the defendants spent an exhaustive amount of time briefing their requests for fees and sanctions, neither of which included unprecedented legal issues. In fact, the only related issues therein that even warranted debate were whether Plaintiffs filed the immediate case in bad faith and to what extent their lack of bad faith mitigates a fee award.

3. Skill Required to Properly Perform Legal Services

Although the defendants' legal team provided excellent representation here, the case itself did not require any specialized advocacy skills.

4. Attorneys' Opportunity Costs in Pressing the Litigation

This was not a significant factor in this case.

5. Customary Fee for Similar Cases

Plaintiffs concede that the hourly billing rates charged by the defense attorneys in this case were reasonable and consistent with those in and around the Richmond legal market. However, Plaintiffs contest the number of hours defense counsel devoted to the case. The Court agrees that some adjustment is appropriate.

6. Attorneys' Expectations at the Outset of Litigation

This was not a significant factor in this case.

7. Time Limitations Imposed by Client or Circumstances

In accordance with the typical practice in the United States District Court for the Eastern District of Virginia, counsel were required to brief and argue dispositive motions within a very narrow time frame.

8. Amount in Controversy and Results Obtained

This was not a significant factor in this case.

9. Experience, Reputation, and Ability of the Attorneys

This was not a significant factor in this case.

10. Undesirability of the Case within the Legal Community

There was nothing particularly undesirable about defending this case.

11. Nature and Length of Professional Relationship Between Attorney and Client

This is not a significant factor in this case.

12. Awards in Similar Cases

Plaintiffs draw the Court's attention to *Bass v. E. I. DuPont de Nemours & Co.*, 324 F.3d 761 (4th Cir. 2003), as a comparable case involving Title VII claims. The trial court in the *Bass* case, which granted summary judgment to the defendant, awarded attorneys' fees in the amount of $10,968.69. *Id.* at 767. Although the defendant had requested $21,937.39 in fees, which the court found to be reasonable, the district court reduced that amount by one-half because of the plaintiffs financial circumstances. *Id.* On appeal, the Fourth Circuit ratified the district court's approach. Likewise,

in assessing fees in the immediate case, this Court will apply the valuable logic of *Bass*.

C. Total Amounts of Reasonable Attorneys' Fees

Based on the foregoing review, the Court finds that the following fees are reasonable for the legal services performed in this case:

Staff Person	Hours	Rate	Total
Crockett	62	$205	$12,710.00
Paul	67	$172	$11,524.00
Holland	20	$163	$3,260.00
Bray	83	$130	$10,790.00
Glover	22	$121	$2,662.00
Burch	20	$75	$1,500.00
			$42,446.00

D. Adjusting the Award

Finally, before it can adjudicate the final award in this case, the Court must consider a number of additional factors and public policy considerations, and adjust the reasonable rate accordingly. First, although 42 U.S.C. § 2000e-5(k) is primarily a reimbursement statute, the Court is required to determine what amount is necessary, in this case, to provide a deterrent effect. Of course, the statute is not intended to defeat the overarching remedial purposes of Title VII or to discourage the filing of all but the most solidly pled cases. *See Christiansburg*, 434 U.S. at 422. The immediate lawsuit, however, evolved from theories as yet unrecognized by established law.

Moreover, even if the claims had stated a cause of action, several are so lacking in factual foundation as to be risible. On the other hand, in the balance between equity and deterrence, Plaintiffs' lack of bad faith and avowed commitment to their cause are each entitled to some weight.

Finally, and perhaps most significantly, the Court is required to consider the relative financial positions of the litigants. "The policy of deterring frivolous suits is not served by forcing the misguided plaintiff into financial ruin simply because he prosecuted a groundless claim." *Arnold*, 719 F.2d at 68. *Accord DeBauche v. Trani*, 191 F.3d 499, 511 (4th Cir. 1999). Obviously, DuPont is fully capable of absorbing a reasonable share of its legal fees without suffering a material hardship. The question is what is "reasonable" in the context of an unfounded lawsuit?

Clearly, Plaintiffs are gentlemen of modest means each of whom possesses limited disposable income. Of course, this does not absolve any of them of his responsibility for filing frivolous legal claims. *See Bass*, 324 F.3d at 767. Consequently, and in light of the financial positions of the parties, the Court will require the plaintiffs to reimburse the defendants for $26,100.00 in attorneys' fees and $1,450.00 in associated costs, for a total of $27,550.00. The Court will apportion the award as follows:[2]

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[2]These numbers are based on the financial status of the individual plaintiffs as described in their affidavits. Each affidavit was previously filed as an exhibit in this case.

Plaintiff	Portion of Award Payable
Kevin L. Chaplin	$ 5,500
James P. Jones	$ 3,500
Robert C. Lewis	$ 3,500
Marvin L. Oliver	$ 2,500
Lynn E. Ritenour	$ 5,000
David E. Rowlette	$ 4,000
Stephen J. Turley	$ 3,550 (Counts 1 & 2 only)

E. Amount of Sanctions against Lyons

Additionally, considering both the foregoing analysis and the circumstances that led up to this determination,[3] it is the judgment of the Court that the actions of Kirk D. Lyons, Esquire merit sanctions, pursuant to Rule 11(b)(3), in the amount of $10,000.

F. Conclusion

In sum, the Court awards attorneys' fees totaling $26,100.00 and costs of $1,450.00, for a total of $27,550.00, payable as indicated above. The Court further sanctions counsel for the plaintiffs in the amount of $10.000. An appropriate Order will accompany this Memorandum Opinion.

Let the Clerk send a copy of this Memorandum to all counsel of record.

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[3]One of these circumstances was Lyons's request, tendered during oral argument, that the Court sanction him personally. In so doing, Lyons noted that the Southern Legal Resource Center, whose representative joined Lyons at counsel table, would likely indemnify him.

/s/ Henry E. Hudson
United States District Judge

Date: Feb. 18, 2004
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KEVIN LAMBERT CHAPLIN, *et. al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No.
	)	3:03cv469
DU PONT ADVANCE FIBER	)	
SYSTEMS, DU PONT SPRUANCE,	)	
DU PONT TEXTILE &	)	
INTERIORS, INC.,	)	
	)	
Defendants.	)	

[ENTERED: FEBRUARY 18, 2004]

FINAL ORDER
(Granting in Part and Denying in Part Defendants' Rule 11 Motion for Sanctions and Granting Defendants' Motion for Attorneys' Fees and Expenses)

This case was before the Court on Defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure [hereinafter "Rule"] 11 and Defendants' Motion for Attorneys' Fees and Expenses. For the reasons stated both in the accompanying Memorandum Opinion and from the bench, Defendants' Rule 11 Motion for Sanctions is DENIED as to all counts under Rule 11(b)(1) and (b)(2). Defendants' Motion for Sanctions, under Rule 11(b)(3), is DENIED as to Count I and GRANTED as to Counts

II and III. For his violation of Rule 11(b)(3), the Court awards sanctions against Plaintiffs' counsel, Kirk D. Lyons, Esquire, in the amount of $10,000.00.

Additionally, the Court GRANTS Defendants' Motion for Attorneys' Fees and Expenses under 42 U.S.C. § 2000-e(5)(k). Accordingly, the Court ORDERS that the Plaintiffs pay $26,100.00 of Defendants' attorneys' fees and $1,450.00 of Defendants' expenses. Plaintiffs are Ordered to pay the award in the following amounts: Kevin L. Chaplin is HEREBY ORDERED to pay $5,500.00; James P. Jones is HEREBY ORDERED to pay $3,500.00; Robert C. Lewis is HEREBY ORDERED to pay $3,500.00; Marvin L. Oliver is HEREBY ORDERED to pay $2,500.00; Lynn E. Ritenour is HEREBY ORDERED to pay $5,000; David E. Rowlette is HEREBY ORDERED to pay $4,000.00; and Stephen J. Turley is HEREBY ORDERED to pay $3,550.00.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

/s/ Henry E. Hudson
United States District Judge

Date: Feb. 18, 2004
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KEVIN LAMBERT CHAPLIN, *et. al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No.
	)	3:03cv469
DU PONT ADVANCE FIBER SYSTEMS, DU PONT SPRUANCE, DU PONT TEXTILE & INTERIORS, INC.,	)	
	)	
Defendants.	)	

[ENTERED: MARCH 8, 2004]

MEMORANDUM OPINION
(Denying Plaintiffs' Motion to Alter or Amend Judgment)

This case is before the Court on Plaintiffs' most recent Federal Rule of Civil Procedure [hereinafter "Rule"] 59(e) Motion to Alter or Amend Judgment. In the motion, Plaintiffs urge this Court to "correct statements of fact contained in the Court's [February 18, 2004] Opinion and reconsider its Orders of Plaintiffs' claims." Mot. to Alter or Am. J. 2. Because the Court finds that neither its February 18 opinion nor the order that accompanied it contains misstatements of fact or errors of law that would justify an alteration or amendment, Plaintiffs' motion will be denied.

For the second time in this case, the Court is guided by the general principles that govern Rule 59(e) motions for reconsideration:

> In general, any party may move to alter or amend a judgment within ten (10) days after entry thereof. Fed. R. Civ. P. 59(e). A district court may only grant a Rule 59(e) motion, however, under limited circumstances. *Collison v. Int'l Chemical Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994). Those circumstances include "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Id.* Under any circumstance, however, reconsideration of a judgment is an exceptional remedy that must be given sparingly. *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir.), *writ of cert. denied*, 525 U.S. 1104 (1999).

Mem. Op. Denying Pl.s' Mot. for Reconsideration (January 7, 2004) 2-3.

Here, as before, Plaintiffs suggest none of the requisite events that would allow this Court to amend its opinion and order. Instead, Plaintiffs reiterate the same arguments they previously submitted to the Court. Of course, the Court is aware of Mr. Lyons's unfortunate change in financial circumstances. The Court is sympathetic to Mr. Lyons and his family. As

Mr. Lyons has often reminded the Court, however, the Southern Legal Resource Center is likely to indemnify him for his part in drafting and filing the immediate pleadings. Consequently, the Court finds no need to alter or amend its ruling with respect to either the adjudication of Rule 11 sanctions[1] or the award of attorneys' fees and costs.

Accordingly, Plaintiffs' motion will be denied.

An appropriate Order will accompany this opinion.

The Clerk of Court is directed to send a copy of this Memorandum Opinion to all counsel of record.

/s/ Henry E. Hudson
United States District Judge

Dated:
March 5, 2004
Richmond, Virginia

[1]Plaintiffs' counsel requests clarification as to whom he should pay sanctions. It will be the order of this Court that Mr. Lyons shall remit his payment to the defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KEVIN LAMBERT CHAPLIN, *et. al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No.
	)	3:03cv469
DU PONT ADVANCE FIBER	)	
SYSTEMS, DU PONT SPRUANCE,	)	
DU PONT TEXTILE &	)	
INTERIORS, INC.,	)	
	)	
Defendants.	)	

[ENTERED: MARCH 8, 2004]

ORDER
(Denying Plaintiffs' Motion to Alter or Amend Judgment)

This case is before the Court on Plaintiffs' most recent Federal Rule of Civil Procedure 59(e) Motion to Alter or Amend Judgment. For the reasons stated in the accompanying memorandum opinion, Plaintiffs' motion is HEREBY DENIED.

Additionally, with respect to this Court's previous ruling that Plaintiffs' counsel, Kirk D. Lyons, Esquire, shall pay sanctions for his violation of Federal Rule of Civil Procedure 11, the Court HEREBY ORDERS that counsel shall remit the $10,000 sanction award to the defendants.

It is so ORDERED.

Let the Clerk send a copy of this Order to all parties of record.

/s/ Henry E. Hudson
United States District Judge

Date: March 5, 2004
Richmond, Virginia

(2)

No. 04-1673

Supreme Court U.S.
FILED
JUL 13 2005
CLERK

In The
Supreme Court of the United States

KEVIN LAMBERT CHAPLIN; JAMES P. JONES; ROBERT C. LEWIS, JR.; MARVIN C. OLIVER; LYNN EUGENE RITENOUR; DAVID EUGENE ROWLETTE; STEPHEN JACKSON TURLEY,

Petitioners,

v.

DU PONT ADVANCE FIBER SYSTEMS; DU PONT TEXTILE & INTERIORS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

In accord with Supreme Court Rule 29.6, Respondents Dupont Advance Fiber Systems and DuPont Textile & Interiors, Inc., state they have no parent corporation, and state no publicly held company owns 10% or more of the stock of either.

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SUMMARY OF ARGUMENT

Petitioners Kevin L. Chaplin ("Chaplin"), James P. Jones ("Jones"), Robert C. Lewis ("Lewis"), Marvin L. Oliver ("Oliver"), Lynn E. Ritenour ("Ritenour"), David E. Rowlette ("Rowlette"), and Stephen J. Turley ("Turley") ("Petitioners") seek a Writ of Certiorari on nothing more than alleged abuses of discretion by the trial court in applying uncontested facts to well-settled principles of law. See S. Ct. Rule 10. Petitioners argue the United States District Court for the Eastern District of Virginia ("District Court") abused its discretion in finding that Petitioners' claims were "frivolous, unreasonable, and without foundation," and thus awarding attorney fees to DuPont Advance Fiber Systems and DuPont Textile & Interiors, Inc. ("DuPont").

Petitioners also claim that the District Court abused its discretion when it sanctioned Petitioners' counsel Kirk D. Lyons ("Lyons") because his filing and advocating of Petitioners' race and religious discrimination claims violated the standards imposed by Rule 11, and that the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") erred in affirming the sanction award against Lyons as to Petitioners' race claim because it was frivolous, unreasonable and without foundation. Lyons is not a petitioner and has not filed anything on his behalf with this Court, so this Court cannot grant him any relief. Furthermore, the decision to sanction Lyons under Rule 11 was not an abuse of discretion. No reasonable attorney could have believed that Petitioners' race or religious discrimination claim was legally or factually

justified. Lyons' attempt to create facts immediately prior to filing this suit demonstrates that he knew of at least one fatal flaw in the religious discrimination claim. Moreover, given the well-established requirement that a plaintiff plead and prove an adverse employment action in order to prevail on a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e, *et seq.*, the Amended Complaint was, on its face, frivolous, unreasonable, and without foundation. The award of sanctions against Lyons and the award of attorney fees against Petitioners were justified and were not abuses of discretion.

STATEMENT OF THE CASE

Factual Background

This odyssey began with a DuPont policy banning displays of offensive symbols on DuPont property, including DuPont's Spruance Plant in Richmond, Virginia. The ban is limited to known disruptive symbols such as swastikas and, in this instance, the Confederate battle flag; other symbols of the Confederacy, such as images of Robert E. Lee or Stonewall Jackson, are not prohibited. Each of the Petitioners is an employee at DuPont's Spruance Plant. None alleges a termination, demotion, or other adverse change in employment conditions, merely that he was told to remove depictions of the Confederate battle flag from his lunch box, t-shirts, belt buckles, and car bumper. *See Chaplin v. DuPont Advance Fiber Systems*, 293 F.Supp.2d 622, 625-26 (E.D.Va. 2003) ("*Chaplin I*"). Petitioners claim DuPont's rule against disruptive symbols discriminated against them because of the race

(white) their "national origin" ("Confederate Southern American"), and their religion (Christian), even though DuPont's ban on the Confederate battle flag applies equally to all employees. *Id.*

The Petitioners' "national origin" of "Confederate Southern American" is based on whether some ancestor, possibly unknown, fought in the southern armies during the four-year period of rebellion in the 1860s[1]. As a result, this "national origin" is multi-racial, since some African-Americans fought for the Confederacy. *See Chaplin v. DuPont Advance Fiber Systems*, 303 F.Supp.2d 766, 774 (E.D.Va. 2004) ("*Chaplin II*"). It also assumes Petitioners have forsaken any other "national origin" based on the hundreds of ancestors who did not fight for the Confederate States of America.

Six of the Petitioners – all but Turley – also claim to attach a specific religious significance to the Confederate battle flag. Specifically, they assert that it is a "venerated symbol of their Christian religion," and so DuPont's policy discriminated against them because of their religion. Petitioners have never said how their religious beliefs require that they be allowed the unfettered right to display the Confederate battle flag wherever they please (including belt buckles and lunch boxes), nor do they claim that the policy applied to

---

[1] Regarding the Petitioners, this ancestry is based on one of eight great-grandparents (Ritenour and Turley), one or two of sixteen great-great-grandparents (Jones and Rowlette), a single great-great-great-uncle (Chaplin), or just the hope that some ancestor fought in the Confederate army (Jones and Lewis).

only Christians, indeed, it applied equally to all employees. *Chaplin I*, at 628 n.8.

In addition to their claim that DuPont's ban on displays of the Confederate battle flag discriminated against them because of their religion, Petitioners also claim that DuPont failed to accommodate their religious beliefs. The claim is based on a single, orchestrated request for "accommodation" of their unique religious beliefs eight months after Petitioners had filed their charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") and a week before the initial Complaint actually was filed.[2] Five of the Petitioners simultaneously delivered virtually identical notes to their respective supervisors stating that the Confederate battle flag was a "venerated symbol of [their] Christian religious faith and a venerated symbol of [their] ancestry" and asked that DuPont accommodate them by allowing them to display the symbol while at work. This last minute effort to correct an obvious defect in pleadings is not only transparent, but it seeks no "accommodation" at all; it demands that DuPont rescind its policy, at least as to Petitioners.

---

[2]The "requests for accommodation" were also delivered after the Complaint was likely drafted because Petitioners' local counsel, Thomas Roberts, stated that he was presented with the Complaint and asked to sign as local counsel on the following day, May 23, 2003.

Procedural History

Petitioners commenced this action on May 20, 2003, by filing their initial Complaint[3] against DuPont. The Complaint purports to state three counts of employment discrimination (race, national origin, and religion) in violation of Title VII. All three counts arise from DuPont's refusal to allow Plaintiffs to display representations of the Confederate battle flag. All Petitioners joined in the national origin and race discrimination counts, and all but Turley joined the religious discrimination claim.

On October 13, 2003, DuPont served Petitioners with DuPont's motion under Rule 11 of the Federal Rules of Civil Procedure and demanded, as required by Rule 11(c)(1)(A), that the Amended Complaint be voluntarily dismissed within 21 days. The following day, October 14, 2003, DuPont filed and served its Motion to Dismiss pursuant to Rule 12(b)(6). Because Lyons and Petitioners refused to take any corrective action within the 21-day window provided by the Rule, DuPont filed its previously served Rule 11 Motion with the District Court on November 7, 2004.

On November 25, 2003, the District Court entered its order granting DuPont's motion to dismiss all counts of the Amended Complaint. Petitioners did not appeal this dismissal and the lack of merit in their Amended Complaint is not before this Court and cannot be challenged by Petitioners. By this same

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[3] Petitioners subsequently filed an Amended Complaint on September 17, 2003, which contained the same three substantive counts as the initial Complaint.

order, the District Court took DuPont's motion for sanctions under advisement and established a schedule for further proceedings on that motion. DuPont subsequently filed a Motion for an award of attorney's fees pursuant to 42 U.S.C. § 2000e-5(k).

The motions for Rule 11 sanctions and attorney's fees were heard on January 30, 2004. As to the Rule 11 motion, the District Court noted that while it "did not believe that the legal issues raised here have any kind of moorings whatsoever," it would not sanction Lyons because he did not act in bad faith. The District Court then stated that DuPont was entitled to recover at least some of its attorney's fees and costs from the Petitioners, whereupon Lyons invited error by specifically telling the District Court: "if you want to impose that burden [of attorney's fees and costs], impose it on me, ... and the SLRC, which has voted to indemnify me." In response to this invitation for error, the District Court asked the parties to submit supplemental briefs, after which it would "decide what amount of attorneys' fees will be paid and how that payment will be apportioned among the plaintiffs and counsel."

DuPont filed a supplemental memorandum that established - Lyons' impassioned plea notwithstanding - that an award of attorney fees pursuant to Section 2000e-5(k) could only be assessed against parties. DuPont also advised the District Court that that the standard under Rule 11(b)(1) and (b)(2) is objective, and subjective bad faith is not relevant.

The District Court entered its Final Order on February 18, 2004, granting DuPont's Rule 11 motion as to race and religious discrimination counts and granting DuPont's motion for fees and expenses. On the Rule 11 motion, the District Court concluded that the national origin discrimination claim filed by Lyons "marginally satisfies Rule 11(b)(3)" and exercised its discretion not to sanction Lyons with regard to that claim. *Chaplin II*, at 771. By filing and advocating the remaining two counts of the Amended Complaint, however, the District Court found that Lyons violated Rule 11. The District Court found the religious discrimination claim "so lacking in reasonable evidentiary support" that it "must impose Rule 11 sanctions for the filing of that claim." *Id.* The District Court reached this conclusion because "nowhere in the Amended Complaint did Plaintiffs allege that they had both requested and been denied a religious accommodation. Even Plaintiffs' belated letter-writing effort failed to support such a claim."[4] *Id.* The District Court also concluded that the race discrimination claim was "neither factually supported nor supportable" because "Plaintiffs' averred class, Confederate Southern American, is multiracial." *Id.*

As to DuPont's request for an award of attorney's fees and costs, the District Court restated the flaws in the claims that merited sanctioning Lyons, and further explained that the entire Amended Complaint was "frivolous, unreasonable, and without foundation"

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[4] The District Court stated this "eleventh hour attempt to show that they made such a request, many weeks after they sought relief from the [EEOC], [was] not only incredible, but, frankly, disingenuous." *Id.* at 774.

because the Plaintiffs "did not suffer an adverse employment action, and it was unreasonable for them to argue that they had experienced such adversity." *Id.* at 774. The District Court also singled out the race discrimination claim as "particularly frivolous" because the Petitioners

> fail[ed] to aver, in any way, shape, or form, that [they] received disparate treatment based on their race. In fact, inasmuch as Plaintiffs' group of Confederate Southern Americans seems to include Caucasians, African-Americans, and Native Americans, Plaintiffs aver *no one particular race* that was affected by DuPont's ban.

Id. (emphasis in original). Based on these findings, the court assessed awards of attorney fees against each of the Petitioners and sanctioned Lyons for his failure to meet his obligations imposed by Rule 11 in the amount of $10,000 payable to DuPont. *Id.* at 779

Lyons and the individual Petitioners appealed these awards on April 7, 2004. Following oral argument, the Fourth Circuit affirmed the District Court in a *per curiam* opinion. The Fourth Circuit affirmed the District Court's opinion in full, with the exception that it held that Lyons should be sanctioned under Rule 11 for his failure to allege any adverse employment action – the very reason Petitioners were ordered to pay DuPont's attorney's fees – and not because Petitioners' "national origin" was multi-racial. From that decision, and without any request for

rehearing for an alleged failure to provide proper notice to Lyons of the record grounds it relied upon to affirm the District Court, Petitioners filed their Petition for Writ of Certiorari with this Court.

ARGUMENT

I. The Rule 11 Sanctions Award Against Lyons is Not Properly Before This Court.

While Lyons was a party to the appeal before the Fourth Circuit, he is not listed as a petitioner. Petitioners' list of all parties to the proceeding does not list him as a party but as someone who is "also interested in the outcome of this decision." Pursuant to Supreme Court Rule 12, "parties who file no document [with the Court] will not qualify for any relief from this Court." S. Ct. Rule 12.6. By rule, as a party to the proceedings below, Lyons is a party to this proceeding, however,

> [a]ll parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, except that a response supporting the petition shall be filed within twenty days after the case is placed on the docket, and that time will not be extended.

Id. Lyons' response supporting the Petition needed to be filed by July 5, 2005, and was not. *Id.* As a result, Lyons is not entitled to any relief from this Court.

Petitioners have no standing to challenge the sanction award against Lyons. Where an award of Rule 11 sanctions run only against the attorney, the attorney must appeal in his own name. *Mylett v. Jeane*, 879 F.2d 1272, 1275 (5th Cir. 1989); *Reynolds v. East Dyer Development Company*, 882 F.2d 1249, 1254 (7th Cir. 1989). Lyons' failure to comply with the rules of this Court means that he cannot qualify for any relief from this Court and Petitioners themselves are without standing to advance the claims of their counsel. *See generally, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (discussing requirements for standing). For this reason alone, the Petition regarding the Rule 11 sanctions against Lyons should not be granted.

II. The Sanctions Award Levied Against Lyons was Proper.

1. Lyons had sufficient notice of the grounds that served as the basis for affirming the sanction award.

Lyons' claim that he was denied proper notice to defend himself on the grounds relied upon by the Fourth Circuit to affirm the sanctions award against him requires an unreasonably narrow reading of the facts of this case. The Fourth Circuit ultimately decided that sanctions against Lyons were appropriate as to the improperly filed race discrimination claim because the Amended Complaint fails to allege that Petitioners had suffered any adverse employment action. Petitioners (and Lyons) knew of this deficiency in their pleadings from the outset of this matter; this failure to comply with a basic requirement for filing a

claim under Title VII was articulated by Dupont as the grounds to support its successful Motion to Dismiss. Petitioners' abject failure to state a *prima facie* case against Dupont also served as the basis for Dupont's seeking - and receiving - an award of attorney fees against Petitioners themselves, an award Lyons improperly invited the Court to levy against him personally.

Lyons' argument boils down to simply this: it was improper for the Fourth Circuit to affirm an award of sanctions against him based on a reason that he had briefed, argued and lost with regard to the award of attorney fees against his clients.[5] The right of the Fourth Circuit, or any circuit court, to affirm a lower court decision based on any reason established in the record is above reproach. In 1945 this Court called it a "long settled rule" that "in reviewing the decision of a

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[5] The District Court's award of Rule 11 sanctions and the Fourth Circuit's affirmance of that award merely state that Lyons is to be sanctioned in the amount of $10,000 for his conduct. Neither court divided the amount into a sanction award based on the improper filing of a race discrimination claim and a sanction award based on the improper filing of a religious discrimination claim. Consequently, even if this Court should grant the Writ of Certiorari on this point - and it should not - and even if this Court would eventually determine that the award of sanctions on this claim was in error - and it was not - the effect of this ruling could be nonexistent. The District Court could simply, and well within its discretion, determine that Lyons' actions deserved to be sanctioned in the amount of $10,000 solely based on his decision to file a factually meritless claim for religious discrimination after arranging for a belated request for accommodation. The application of this decision could be inconsequential in this matter and of no long-standing effect baring a repetition of the same convoluted fact pattern.

lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *see also Bennett v. Spear*, 520 U.S. 154, 166 (1997) ("A respondent is entitled, however, to defend the judgment on any ground supported by the record."). Petitioners cite no exception to this general rule merely because the matter at issue is an award of sanctions under Rule 11, and there is none. In this case, the result from the District Court was correct - Lyons' conduct deserved sanction - and the Fourth Circuit was correct to affirm.

While the parenthetical explanations provided by Petitioners in connection with their case citations reveal that they realize the cases are of minimal relevance, the parentheticals actually overstate the relevance of each case. In truth, they are completely inapposite to any issue at hand. The Tenth Circuit in *Hutchison v. Pfeil*, 208 F.3d 1180 (10th Cir. 2000), held that the award of Rule 11 sanctions cannot be affirmed based on a statutory provision permitting an award of attorney fees where the district court expressly denied a motion for attorney fees under that statute. *Id.* at 1186. The court in *Burda v. M. Ecker Company*, 954 F.2d 434 (7th Cir. 1992), noted that it could not consider the propriety of imposing sanctions on a party under a statutory provision where "the district court specifically relied on Rule 11 to impose sanctions" and did not address the statutory provision. *Id.* at 441. Finally, the court in *Conkle v. Potter*, 352 F.3d 1333 (10th Cir. 2003) determined that it could not affirm the

dismissal of a complaint as a proper sanction under Federal Rule of Civil Procedure 41(b) where "the district court's dismissal order was not based on a sanction analysis, [and] the court did not evaluate the required sanction factors on the record." *Id.* at 1337. In this case, however, the District Court properly granted Dupont's motion for attorney fees pursuant to Section 2000e-5(k) based on the record before it because Petitioners' filing was frivolous and without merit.

The Fourth Circuit's decision to affirm the District Court's award of Rule 11 sanctions against Lyons based on his filing of the race discrimination claim was appropriate, even though the grounds advanced by the Fourth Circuit in support of the sanction were slightly different that those cited by the District Court. Lyons had sufficient notice to prepare and defend the claim and his rights have not been violated.

2. The award of sanctions against Lyons for filing and advocating the race discrimination claim was legally justified.

For reasons that will be discussed in greater detail later in this Response, there is simply no legitimate argument that Petitioners suffered any adverse employment action that would be cognizable under Title VII. Petitioners were merely asked to not place stickers and decals on their lunch boxes and to refrain from wearing certain t-shirts and belt buckles. None of the Petitioners were disciplined and none suffered the slightest diminution in pay, rank, or benefits. Petitioners' claim that they suffered an

adverse employment action is thoroughly without merit and properly supports an award of sanctions against Lyons for his filing and advocating the race and religious discrimination claims.

Furthermore, the reason given by the District Court for sanctioning Lyons was legally correct. Petitioners allege that they were discriminated against as "Confederate Southern Americans" because of their race. As Petitioners inconsistently - and nonsensically - argue, the group "Confederate Southern Americans" is multiracial; Petitioners offered affidavits by African Americans and one member of the Cherokee Nation in support of this contention. Petitioners also alleged that the Dupont policy affected all "Confederate Southern Americans;" Petitioners never argued that it applied to only one race. Merely because Petitioners were all white is not sufficient, because "never once did they [Petitioners] suggest that Dupont's policy discriminates, directly or indirectly against Caucasians." *Chaplin II*, at 771. The District Court Petitioners

> failed to aver, in any way, shape, or form, that Plaintiffs received disparate treatment based upon their race. In fact, in as much as Plaintiffs' group of Confederate Southern Americans seems to include Caucasians, African Americans, and a Native American, Plaintiffs aver no *one, particular* race that was affected by Dupont's ban.

Id. at 774 (emphasis in original). Simply put, Petitioners never alleged that Dupont's ban on displays of the Confederate battle flag in the workplace was enforced unequally because of race: the ban affected all employees in the same manner including nonwhite "Confederate Southern Americans." Petitioners' Amended Complaint, on its face, was "particularly frivolous" and sanctions against Lyons for filing and advocating it were proper.

3. "Lyons had absolutely no factual foundation upon which to base a claim of religious discrimination."

Lyons' argument here is simply a "third bite at the apple." He does not advance a novel theory or allege that the Fourth Circuit made an error of law; he simply claims the prior courts failed to understand the facts and repeats his tired, twice-rejected argument. Such a claim, especially where the original decision was charged to the sound discretion of the trial court, *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), does not belong before this Court. *See* S. Ct. Rule 10.

The District Court found, and the Fourth Circuit affirmed, that Lyons could neither plead nor prove that the Petitioners "had both requested and been denied a religious accommodation." Lyons problem is not merely that he failed to plead sufficient facts to defeat a motion to dismiss. Instead, the record as a whole, including the Amended Complaint, establishes that Lyons either did not conduct a reasonable pre-filing inquiry or ignored the results of his inquiry. In either

event, Lyons' conduct is deserving of sanction under Rule 11 and the District Court did not abuse its discretion in awarding sanctions.

As noted, Lyons and the Petitioners did not appeal the District Court's decision to dismiss this count. Lyons also does not contest the underlying law, specifically that Petitioners must prove they informed DuPont of both their religious needs and their need for accommodation. Petition for Writ of Certiorari at 11; *see also Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996). Lyons, consequently, should not now challenge the finding that they failed to request an accommodation because that is the law of the case. *See Messinger v. Anderson*, 225 U.S. 436, 444 (1921) (stating courts should refuse to reopen what has been finally decided).

Petitioners' failure to allege a request for accommodation was properly decided. Lyons cannot identify any actual request for accommodation of "sincere religious beliefs" prior to his clients' charges of discrimination with the EEOC. He merely claims that because DuPont knew that the Petitioners were claiming to be the victims of religious discrimination, DuPont should have known that Petitioners were seeking an accommodation. Claims for discriminatory treatment and for failure to accommodate, however, are separate and distinct, "[t]herefore, they are not like or reasonably related to one another, and one cannot expect a failure to accommodate claim to develop from an investigation into a claim [of disparate treatment]." *Green v. National Steel Corp., Midwest Div.*, 197 F.3d 894, 898 (7th Cir. 1999) (considering the Americans with

Disabilities Act); *see also Marshall v. Federal Express Corp.*, 130 F.3d 1095, 1098 (D.C. Cir. 1997) (holding failure to accommodate claim barred where plaintiff filed an EEOC charge alleging failure to promote based on a disability but did not mention a failure to accommodate). Mere knowledge of a discrimination claim is not sufficient to give notice of a need for accommodation.[6]

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[6] The Fourth Circuit in *Tulon* did say that knowledge of an employee's sincere religious belief could put the employer on notice of some religious conduct at work, such as ashes on Ash Wednesday or wearing a yarmulke. *Tulon*, 101 F.3d 1020 n3. There is nothing associated with Petitioners' "sincere Christian beliefs" that would put DuPont on notice that Petitioners had a religious need to place decals of the Confederate battle flag on their lunch box. While the Confederate battle flag may have a cross – or more accurately an "x" – upon it, it was not placed there as a religious symbol but as part of a sectarian battle flag. Nor is it reasonable to believe that the Confederate government intended it to have religiosity attached to it. The CSA's constitution contained the very same separation of church and state provision that is found in the first amendment to the United States Constitution. Constitution of the Confederate States of America, Art. I, § 9, ¶ 12. Finally, the evidence before the District Court demonstrated that this "venerated symbol" of their Christian faith was displayed by their supporters protesting outside DuPont's gate with superimposed skull and crossbones and the words "the South shall rise again." Lyons' own SLRC attempts to raise funds by selling stickers of this "religious icon" the form of a hand with thumb uplifted and the rather secular slogan "Thumbs up for Dixie." Given this present activity and the historical connection between this flag and the forces of hatred in this country for over 100 years, these Petitioners owed DuPont some explanation of the religious significance of this flag and how their "religion" required a battle flag to be shown on belt buckles, car bumpers and lunch pails was required since one could not be divined from the conduct of Petitioners or their supporters.

Petitioners simply never sought any accommodation. All of the Petitioners' various complaints about the ban of the Confederate battle flag on DuPont property were meticulously documented by DuPont, yet no request for accommodation of Plaintiffs' peculiar religious beliefs appears in those documents. Petitioners' charges of discrimination filed with the EEOC say only that "banning Confederate symbols while not banning other religious symbols worn by other employees is discrimination based on religion by DuPont." The charges contain no allegation of a failure to accommodate. None of these employees ever explained to DuPont or the EEOC exactly how their religious faith required displaying the Confederate battle flag or how these religious rituals could or should be accommodated.

The first and only time any Petitioner asked DuPont to accommodate his religious beliefs occurred when five of the Petitioners tendered, in unison, nearly identical notes that asked DuPont "to accommodate me." And that is all they say; they do nothing more than contain the "magic word" "accommodate." They do not explain (a) what is to be accommodated, (b) why they need an accommodation, and (c) just how this need could be accommodated. DuPont is still left to guess how Petitioners' religion requires displaying a battle flag on a belt buckle or lunch pail and how DuPont could "accommodate" that practice short of ignoring its policy.

In truth, these notes were nothing more than the fruit of a blatantly orchestrated effort by counsel and client to create evidence 83 days after the charges of

discrimination were denied and less than one week before Plaintiffs' right to sue letters expired. The only explanation for such conduct is that someone realized that the religious discrimination claim was fatally flawed, and set out to "fix" this problem. It is no wonder the District Court concluded that this "eleventh hour attempt to show that they made such a request, many weeks after they sought relief from the [EEOC], [was] not only incredible, but, frankly, disingenuous." *Chaplin II*, at 774. Even taking these "follow-ups" in their best possible light for Lyons, they establish that he knew his claim could not succeed.

This last-second letter writing campaign was also ineffective and any pre-filing investigation by Lyons would have revealed this. Petitioners' "right to sue" DuPont was constricted by the four corners of their charges of discrimination filed with the EEOC on September 11, 2002. As a general rule, a Title VII plaintiff cannot bring a claim in a lawsuit that was not included in the EEOC charge. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 37 (1974). Having failed to state a religious accommodation claim in the EEOC charge, Petitioners cannot add this theory in their subsequent lawsuit. Any reasonable pre-filing review would have disclosed this principle. The attempt to take remedial steps, however, suggests it was known.

Lyons' pre-filing review did not satisfy him that his clients' claims were meritorious. To the contrary, that review disclosed to Lyons that these religious discrimination claims were flawed, and he took specific, dubious, and ineffective steps to create evidence in an attempt to overcome the problem.

Under the circumstances, Lyons is rather fortunate that the District Court concluded only that Lyons "had absolutely no factual foundation upon which to base a claim of religious discrimination." The District Court's leniency on this point hardly amounts to an abuse of its discretion.

III. The Award of Attorney's Fees and Costs Against the Petitioners Was Not an Abuse of Discretion.

Again, Petitioners do not assert that the Fourth Circuit applied the wrong law, or created a "split" in the Circuits. They merely argue that the Fourth Circuit misapplied the law to the facts of this case and ask for a third hearing on the issue.

Pursuant to 42 U.S.C. § 2000e-5(k), attorney's fees should be awarded to a prevailing defendant in a Title VII case upon a finding that the Plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The District Court's dismissal of the action prior to discovery, upon a 12(b)(6) motion to dismiss, speaks strongly of the case's frivolity. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (holding a motion to dismiss is appropriate only "when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief").

1. The entire Amended Complaint was "frivolous, unreasonable and without foundation," because Petitioners did not suffer an "adverse employment action."

The inability of a plaintiff to state a *prima facie* case evinces the frivolous quality of a claim, *see, e.g., Barnes Foundation v. Township of Lower Merion*, 242 F.3d 151, 158 (3d Cir. 2001); *Myers v. City of West Monroe*, 211 F.3d 289, 292 (5th Cir. 2000); *Walker v. NationsBank of Florida, N.A.*, 53 F.3d 1548, 1559 (11th Cir. 1995), and the District Court rested its finding that the Amended Complaint was frivolous, unreasonable and without foundation on this basis. The District Court explained that because Petitioners did not allege that they had been terminated, or demoted, or lost any compensation or benefits, but merely theorized that they could have, their

> injury is speculative and, as such, is insufficient to confer standing upon them under Title VII. Moreover, although Plaintiffs are clearly annoyed and offended by DuPont's ban, "Congress did not intend Title VII to provide redress for trivial discomforts endemic to employment."

Chapin I, at 627 (citations omitted). Despite Petitioners' cries to the contrary, there is nothing confusing about this ruling: Petitioners did not allege the facts necessary to assert a *prima facie* case because they did not allege any adverse employment action. The District Court properly analyzed the law, and,

indeed, Petitioners did not appeal this ruling on the merits of their claims. Petitioners have waived any claim that they did, in fact, allege an adverse employment action because such a claim should have been addressed in an appeal of the dismissal on the merits. *See Messinger*, 225 U.S. at 444; *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) (holding arguments not properly raised are waived).

As recognized by the District Court and the Fourth Circuit, the mere possibility of something occurring in the future does not equate to an actionable injury. *See generally Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (stating that to satisfy Article III's standing requirements, a plaintiff must show that he has suffered an injury that is "not conjectural or hypothetical"). While Petitioners claim that something less than termination can support a Title VII suit, they do not advance - not to the District Court, the Fourth Circuit, or here - any case which finds any similar action by an employer to be sufficient. Instead, the "typical requirements for a showing of an 'adverse employment action'" include "discharge, demotion, decrease in pay or benefits, loss of job title or supervisory responsibility, or reduced opportunities for promotion." *Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999). For example, while a new job assignment may have been "unfamiliar and more stressful," it did not "have a significant detrimental effect" sufficient to meet Title VII's threshold. *Id.*; *see also Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001) (finding no adverse employment actions where defendant's conduct, although undoubtedly "irritat[ing]" to the

plaintiff, did not "adversely affect a term, condition, or benefit of employment"); *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997) (finding no adverse employment action where manager yelled at employee and instructed other employees to ignore her and spy on her). At the very most, the inability to place a sticker on one's lunch pail, or to wear a particular t-shirt or belt buckle, is an "irritat[ion]," *Von Gunten*, 243 F.3d at 869, or a "trivial discomfort." *Boone*, 178 F.3d at 255.

Lyons and Petitioners had even more reason than this to know that their pleadings were insufficient. In 2001, the United States District Court for the Eastern District of Virginia considered and rejected a nearly identical claim in *Terrill v. Chao*, No. 00-1488-A (E.D. Va.). The plaintiff in *Terrill* argued that his employer discriminated against him as a "Confederate-American" by refusing to allow him to set up a cultural exhibition booth on the employer's "Diversity Day." In granting summary judgment for the employer, Judge Hylton, the chief judge of the very same federal district in which the instant case was filed, concluded:

> There is no adverse employment action alleged here. This plaintiff's job was not affected in any way by these allegations. He simply did not participate in the certain event. But there was no adverse action to his employment as would be required under Title VII.

The Fourth Circuit affirmed this ruling in an unreported opinion. *Terrill v. Chao*, 31 Fed. Appx. 99,

2002 WL 376681 (4th Cir.) (per curiam) (unpublished), *cert. denied*, 537 U.S. 823 (2002) While this unreported decision may have escaped the attention of the public at large, it was known to Lyons and Petitioners because Mr. Terrill's counsel was none other than Lyons and the SLRC.

A reasonable attorney, who had "examine[d] the suit against the background of the law at the time of the filing," *Lotz Realty Co. v. United States Dep't of Housing and Urban Dev.*, 717 F.2d 929, 932 (4th Cir. 1983), would not have filed it. Petitioners deliberately disregarded rulings of the courts in which they were proceeding - all of which were "published" directly to their counsel. Such actions are patently unreasonable and this Court should not issue a Writ of Certiorari.

2. The religion discrimination claim and the racial discrimination claim in the Amended Complaint were "frivolous, unreasonable and without foundation.

As already explained above, the religious discrimination claim and the racial discrimination claim were sufficiently deficient to bring Rule 11 sanctions down upon Lyons. For the very same reason this analysis supports the District Court's award of Rule 11 sanctions, *see Chaplin II*, at 774, the imposition of fees and costs upon these Petitioners for pursuing these frivolous claims is likewise not an abuse of discretion. *See, e.g., Arnold v. Burger King Corp.*, 719 F.2d 63, 67 (4th Cir. 1983) (affirming trial court's award of attorney's fees where "the record . . . is devoid of

any credible evidence to support [Plaintiff's] claim that he was discharged for racial reasons").

CONCLUSION

Neither Petitioners nor Lyons have advanced any arguments worthy of this Court's consideration, they merely repeat the arguments made, and lost, below, and ask this Court to reverse the application of law to fact made by the District Court and Fourth Circuit without access to the entire record. This Court should refuse the Petition for Writ of Certiorari.

Respectfully submitted,

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